

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**C.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bellmawr, NJ, Employer**

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**Docket No. 16-1713  
Issued: April 21, 2017**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 24, 2016 appellant, through counsel, filed a timely appeal from a March 31, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant met his burden of proof to establish an occupational disease causally related to accepted factors of his federal employment.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

### **FACTUAL HISTORY**

On June 18, 2012 appellant, then a 51-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he developed degenerative disc disease, a herniated disc in the lower back, and bilateral patellar tendinitis as a result of his employment. He related that he woke up on February 14, 2012 with severe lower back and knee pain and called his primary care physician. Appellant stopped work on February 14, 2012.

Appellant submitted a magnetic resonance imaging (MRI) scan report from Dr. Howard Rosenstein, a Board-certified diagnostic radiologist, dated July 23, 2002. Dr. Rosenstein observed mild diffuse disc bulge at L2-L3 and disc desiccation at L4-5 and L5-S1. He diagnosed degenerative disc changes, central herniated nucleus pulposus (HNP) at the L4-5 level, and very small central HNP at the L5-S1 level with loss of discal height.

Dr. Allen Cummings, a Board-certified radiologist, conducted a diagnostic examination of appellant's lumbar spine, as well as right knee and thoracic spine on February 14, 2012. He reported a negative MRI scan of the right knee and thoracic spine. In the MRI scan of the lumbar spine, Dr. Cummings observed degenerative changes and disc degeneration at L4-5 and L5-S1 with spurring and loss of disc signal at both levels. He also reported disc herniation slightly to the right at L4-5 and a larger, irregular herniation slightly to the right at L5-S1.

Appellant was treated by Dr. Harris Bram, Board-certified in anesthesiology and pain medicine. In an examination note dated February 23, 2012, he related appellant's complaints of pain in the lower back for approximately 25 years and progressively worsening pain over the past few weeks. Dr. Bram reviewed appellant's history and conducted an examination. He observed spasm on both sides and no tenderness. Touch sensation was normal. Range of motion was restricted with flexion limited due to pain. Straight leg raise testing and Babinski's sign were negative. Dr. Bram diagnosed thoracic or lumbosacral neuritis or radiculitis and recommended epidural steroid injections at L5-S1 on the right side.

In a letter dated July 10, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish his occupational disease claim. It requested that he complete the attached questionnaire to substantiate the factual elements of his claim and provide medical evidence to establish a diagnosed condition as a result of his federal employment. Appellant was afforded 30 days to submit the requested information.

On July 12, 2012 OWCP received appellant's response to the development letter. Appellant asserted that he would continuously bend, squat, lift, grasp, reach, turn, pull, push, sit, and walk at work. He noted that he also worked a lot of overtime. Appellant explained that most days he delivered 5 to 7 trays of letters, 5 to 8 trays of flat mail, 2 to 3 tubs of flat mail, 20 to 30 parcels, and 2 to 4 certified pieces of mail. He indicated that in addition to his daily routine he delivered four to six trays of advertisements every Thursday. Appellant noted that he had 707 stops on his route. He provided a detailed, step-by-step description of his employment duties from when he clocked into work to when he clocked out.

Dr. Frank C. Alario, an internist, treated appellant and provided various handwritten progress notes and reports. In work excuse notes dated March 27 to April 20, 2012, he indicated

that appellant was under his care for intractable pain, which was unmanageable and disabling. Dr. Alario related that appellant should remain out of work from April to May 1, 2012 due to severe back pain and he scheduled surgery. He opined that appellant's condition was directly related to his employment.

On April 25, 2012 appellant underwent lumbar spine fusion surgery.

In a May 21, 2012 computerized tomography (CT) scan report, Dr. Robert M. White, a Board-certified diagnostic radiologist, noted postoperative status post-bilateral posterior fusion extending from L4 to S1 with anterior fusions

In a May 23, 2012 narrative statement, Dr. Alario noted that appellant was employed by the employing establishment for 23 years and was required to perform constant heavy lifting. He explained that a review of diagnostic testing and physical examination findings revealed that appellant suffered from degenerative disc disease with severe and dangerous radicular damage to both legs, which impaired his ability to walk and stand. Dr. Alario opined that appellant's medical complaints were a direct result of his employment.

Appellant was also treated by Dr. Jeffrey Oppenheimer, a Board-certified neurological surgeon, who provided various progress notes dated February 16 to August 29, 2012. In narrative reports dated July 31 and August 28, 2012, Dr. Oppenheimer related appellant's complaints of low back pain since his mid-20's. He also related that a February 14, 2012 MRI scan of the lumbosacral spine revealed degenerative changes and disc degeneration at L4-5 and L5-S1 with a large disc herniation at L4-5 on the right and larger disc herniation at L5-S1. Dr. Oppenheimer noted that appellant had worked as a mail carrier since 1989 and explained that appellant's job required excessive twisting and lifting of packages. He opined that, based on both the imaging studies and the progressive chronic course of appellant's conditions, they were consistent with aggravation by his duties of carrying letters as a postal worker and were directly related to his employment. Dr. Oppenheimer explained that: "through years of this line of work may cause disc bulges, disc herniation and annular tears." He requested that appellant's work excuse be extended.

By decision dated September 19, 2012, OWCP denied appellant's claim. It accepted his employment duties as a mail carrier and that he was diagnosed with thoracic/lumbosacral radiculitis, degenerative disc disease, lumbar disc herniation, and radicular damage to his legs. However, OWCP denied the claim as the medical evidence of record was insufficient to establish that appellant's medical conditions were causally related to the accepted employment factors.

Appellant, through counsel, requested a hearing before an OWCP hearing representative on September 25, 2012.

Appellant submitted additional narrative reports dated January 15 and February 12, 2013 from Dr. Alario. Dr. Alario noted that he had treated appellant for many years due to constant back problems with multiple herniated discs. He explained that upon reviewing appellant's diagnostic testing and physical examination, he determined that appellant suffered from degenerative disc disease with severe and dangerous radicular damage to both legs, which impaired his ability to walk and stand. Dr. Alario indicated that appellant's job required him to

lift, manipulate, and move various weights of articles and walk or drive various distances. He opined that, due to these activities, appellant suffered an injury to his back which radiated down both his legs. Dr. Alario reported that appellant was permanently disabled and should be granted permanent disability.

In a February 28, 2013 narrative report, Dr. Oppenheimer noted that appellant had not been able to work since February 14, 2012 due to excruciating low back pain radiating down his right leg to the knee. He opined that appellant's work resulted in the deterioration of the lumbar disc herniation and exacerbating the symptoms. Dr. Oppenheimer explained that as the nucleus within lumbar discs were repetitively loaded, the fragmented tissue culminated in herniation of the disc. He opined that the squatting, lifting, grasping, reaching, and pulling in his employment would clearly exacerbate his symptoms and give appellant agonizing pain.

In a May 30, 2013 decision, an OWCP hearing representative set aside the September 19, 2012 decision and remanded the case for further medical development. He determined that although appellant had not submitted sufficient evidence to establish his claim, the evidence was sufficient to require further development of the medical evidence. The hearing representative instructed the district office to prepare a statement of accepted facts (SOAF) and refer appellant to a second opinion examination to determine whether appellant's diagnosed conditions were causally related to factors of his employment.

OWCP referred appellant's claim, along with a SOAF and the record, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant's diagnosed conditions were causally related to his accepted employment factors. In an August 2, 2013 report, he reviewed appellant's history and noted that appellant had experienced back pain since his mid-20s. Dr. Askin indicated that February 14, 2012 MRI scans revealed degenerative disc disease of the thoracic spine and disc bulging and herniation of the lumbar spine at L4-5 and L5-S1. He provided examination findings and indicated that there was no evidence that appellant's employment duties had aggravated his preexisting condition. Dr. Askin concluded that appellant had no medical condition or current disability causally related to his employment.

In a decision dated September 24, 2013, OWCP denied appellant's occupational disease claim. It accepted appellant's employment factors and diagnosed degenerative lumbar condition, but found that the medical evidence of record was insufficient to establish that appellant's employment activities caused or contributed to his degenerative lumbar condition.

Appellant, through counsel, requested a hearing before an OWCP hearing representative by letter dated October 3, 2013. By decision dated May 9, 2014, an OWCP hearing representative again set aside the September 24, 2013 denial decision. She determined that the SOAF reviewed by Dr. Askin was misleading, and accordingly, Dr. Askin's medical opinion based on this SOAF was flawed.<sup>3</sup> The hearing representative requested that OWCP modify the SOAF and request an addendum report from Dr. Askin regarding the issue of causal relationship.

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<sup>3</sup> The hearing representative found that the specific phrase that OWCP had "not accepted any medical conditions to be causally related to the employment-related activities" was misleading and prejudicial in the June 2, 2013 SOAF.

Appellant retired from the employing establishment due to disability effective May 1, 2014.

In a June 2, 2014 supplemental report, Dr. Askin noted that he reviewed the additional information and the amended SOAF and reiterated that appellant had a long history of low back pain for the past 25 years. He reported that there was no support from clinical examination or review of appellant's medical records to support that appellant's condition was caused by, precipitated by, or materially aggravated by appellant's work. Dr. Askin reported that there was no factual showing of a material change in appellant's body, such as some hemorrhage edema, tearing of tissues, or neurologic consequence, due to appellant's employment activities.

By decision dated September 4, 2014, OWCP denied appellant's occupational disease claim. It found that the medical evidence of record failed to establish that appellant's employment activities caused or contributed to appellant's lumbar degenerative disc disease.

In a letter dated September 12, 2014, appellant, through counsel, requested a hearing before an OWCP hearing representative. By decision dated May 15, 2015, an OWCP hearing representative determined that a conflict in medical opinion evidence existed between Dr. Alario, who asserted that appellant's employment duties contributed to his back conditions, and Dr. Askin, who opined that appellant's work duties did not have any effect on his degenerative back condition. He set aside the September 4, 2014 denial decision and remanded the claim for referral to an impartial medical examiner in order to resolve the conflict in medical opinion evidence.

OWCP referred appellant's claim to Dr. Timothy Wagner, a Board-certified orthopedic surgeon, for an impartial examination to resolve the conflict of medical opinion regarding whether appellant's lumbar condition was causally related to his federal work duties as a letter carrier.

In an August 4, 2015 report, Dr. Wagner noted appellant's complaints of constant low back stiffness and right leg numbness in the proximal portion of the leg. He reviewed appellant's history, including the revised SOAF, and provided a discussion of appellant's medical records. Dr. Wagner noted that, based on a review of appellant's radiographic studies and medical history, he found that appellant had a long history of degenerative disc disease of the lumbosacral spine. Upon examination of appellant's lower back, he observed well-healed scars from the fusion surgery. Dr. Wagner noted that appellant walked with a normal gait. He reported extension to the neutral position, forward flexion to the mid-to-lower thigh, and markedly decreased lateral and rotary trunk motion. Straight leg raise testing was to 80 degrees bilaterally with discomfort in the right side. Examination of appellant's left knee revealed symmetrically equal deep tendon reflexes of the knee and ankle joint. Dr. Wagner diagnosed status post-fusion L3-4, L4-5 with residual stiffness and numbness in the right leg.

Dr. Wagner opined that appellant's employment neither caused nor aggravated appellant's degenerative disc disease. He reported that the changes in appellant's lower back, as noted on radiographic studies, were consistent with the normal aging process. Dr. Wagner explained that disc degeneration in the spine was due to degenerative changes in the collagen fibers during the daily cyclic loading and unloading of discs over many years. He indicated that

appellant could have had a very sedentary job and would have the same physical findings. Dr. Wagner included an excerpt from a publication entitled, *Guides to the Evaluation of Disease and Injury Causation*, which indicated that the condition of disc degeneration was determined largely by genetics and that physical loading specific to occupation and sport played a minor role. He agreed with Dr. Askin's medical opinion that appellant's work as a letter carrier did not cause any effect on his underlying back condition, except to cause pain while working.

In a decision dated September 10, 2015, OWCP denied appellant's occupational disease claim. It found that the special weight of medical evidence rested with the August 4, 2015 impartial medical report of Dr. Wagner who opined that appellant's employment did not cause or contribute to appellant's diagnosed lumbar condition.

On September 21, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on January 19, 2016. Counsel alleged that Dr. Askin's June 2, 2014 addendum report was insufficiently rationalized to create a conflict in medical opinion with appellant's treating physicians. He also asserted that Dr. Wagner's August 4, 2015 report was insufficiently well-reasoned to carry the special weight of the medical evidence given to impartial medical examiners. Counsel noted that Dr. Wagner addressed the topics of causation and aggravation in general terms, but he failed to mention whether any of appellant's specific letter carrier duties accelerated or precipitated the condition. He also pointed out that Dr. Wagner did not provide any medical rationale for his conclusion, but merely relied on the generalized reasoning of a scholarly article. Counsel asserted that work factors did not need to be the only cause of the worsening of the preexisting condition, but if the work duties contributed in any way to his condition, then appellant's claim was compensable.

In a February 2, 2016 letter, Dr. Alario indicated that he disagreed with Dr. Wagner's opinion that appellant was not permanently disabled due to normally occurring degenerative disc disease of the lumbosacral spine. He noted that, based on radiologic and clinical evaluation, appellant was unable to proceed as an employee for the employing establishment due to his inability to stand for long periods of time or perform the repetitive movements involved in the duties of a postal worker.

By decision dated March 31, 2016, an OWCP hearing representative affirmed the September 10, 2015 decision. She found that the medical report of Dr. Wagner was sufficiently well-rationalized to carry the special weight of medical evidence and to resolve the conflict in medical opinion as to whether appellant's lumbar condition was causally related to factors of his employment.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence<sup>4</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally

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<sup>4</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

related to that employment injury.<sup>5</sup> In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>6</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>7</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>8</sup> When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.<sup>10</sup>

### ANALYSIS

OWCP found a conflict in medical opinion between appellant's treating physician, Dr. Alario, and the second opinion physician, Dr. Askin, as to whether his lumbar degenerative disc condition was aggravated or worsened by his accepted employment factors. In order to resolve the conflict, it referred appellant to Dr. Wagner for an impartial medical examination. The Board finds that OWCP properly found that a conflict in medical opinion existed and referred appellant's claim to an impartial medical examiner. The Board finds, however, that Dr. Wagner's August 4, 2015 report is insufficient to resolve the conflict in medical evidence on the issue of whether the factors of appellant's employment caused or aggravated his diagnosed spinal condition. Accordingly, the Board finds that this case is not in posture for a decision as to

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<sup>5</sup> *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

<sup>7</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>8</sup> 20 C.F.R. § 10.321.

<sup>9</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>10</sup> *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

whether appellant sustained an occupational disease claim because there remains a conflict in medical opinion evidence.

Dr. Wagner provided a detailed discussion of appellant's medical records and his findings upon examination. He diagnosed degenerative disc disease and status post-fusion L3-4, L4-5 with residual stiffness and numbness in the right leg. Although Dr. Wagner was clear that he did not believe appellant's degenerative process had been aggravated in any way by appellant's employment duties, he provided no rationale for that opinion. Dr. Wagner opined only that the changes in appellant's lower back, as noted on radiographic studies, were consistent with the normal aging process and that degenerative changes occur due to changes in the collagen fibers during the daily cyclic loading and unloading of discs over many years. The only rationale Dr. Wagner provided to support his opinion was an excerpt from a medical journal entitled, *Guides to the Evaluation of Disease and Injury Causation*. This is particularly important in light of the acknowledgement of Dr. Wagner that physical loading specific to occupation plays some role in degeneration of the spine. Further, the Board has held that medical texts and excerpts from publications are for general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.<sup>11</sup> Dr. Wagner failed to explain the significance of this guide's general principles to appellant's specific situation.<sup>12</sup>

The Board notes that it is unnecessary for an employee to prove a significant contribution of employment factors to a condition for the purpose of establishing causal relationship.<sup>13</sup> Rather, if the medical evidence reveals that factors of employment contributed in any way to the disabling condition, such condition is considered employment related for the purpose of compensation under FECA.<sup>14</sup> The opinion of a referee physician or impartial medical specialist is given special weight only when the physician's report is sufficiently rationalized and based upon a proper factual background. When the report lacks medical reasoning to support conclusory statements about the claimant's condition, it is insufficient to resolve a conflict in the medical evidence, and OWCP cannot use such a report to justify terminating benefits. *A.R. and U.S. Postal Service*, Docket No. 12-443 (issued October 9, 2012).

Because Dr. Wagner's report is of diminished probative value, it cannot carry the special weight of the medical evidence and is insufficient to resolve the conflict.

As OWCP referred appellant to Dr. Wagner for an impartial medical examination, it has a duty to obtain a report sufficient to resolve the issues raised and the questions posed to the

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<sup>11</sup> *Gloria J. McPherson*, 51 ECAB 441 (2000); *William C. Bush*, 40 ECAB 1064, 1075 (1989); *N.B.*, Docket No. 14-1702 (issued December 29, 2014); *S.A.*, Docket No. 13-1551 (issued December 17, 2013).

<sup>12</sup> See *J.R.*, Docket No. 12-1639 (issued January 22, 2013) (finding that an impartial medical examination report, which referred to the A.M.A., *Guides to the Evaluation of Disease and Injury Causation*, lacked sufficient rationale to establish that a claimant's bilateral carpal tunnel syndrome had no relation to his employment and was insufficient to resolve the conflict).

<sup>13</sup> *D.J.*, Docket No. 16-0288 (issued May 25, 2016).

<sup>14</sup> See *Glenn C. Chasteen*, 42 ECAB 493 (1991); *Beth P. Chaput*, 37 ECAB 158 (1985).



specialist.<sup>15</sup> The case will be remanded to OWCP for further development of the medical evidence and a supplemental opinion from Dr. Wagner. After such further development as OWCP deems necessary, an appropriate decision should be issued regarding this matter.

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2016 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: April 21, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> *Melvin James*, 55 ECAB 406 (2004).